

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CITY OF SEATTLE, a first-class charter city,	)	No. C07-1620MJP
)	
Plaintiff,	)	DEFENDANT'S REPLY IN SUPPORT OF
	)	MOTION TO (i) ELIMINATE
v.	)	ATTORNEY'S EYES ONLY ("AEO")
	)	DESIGNATIONS AND ELIMINATE
THE PROFESSIONAL BASKETBALL CLUB,	)	IMPROPER PRIVILEGE REDACTIONS;
LLC, an Oklahoma limited liability company,	)	(ii) SEAL DOCUMENTS PENDING
	)	RULING ON AEO STATUS, and (iii)
Defendant.	)	ELIMINATE TEN-DAY WAITING
	)	PERIOD
)	
	)	NOTE ON MOTION CALENDAR:
	)	May 2, 2008
)	
)	
)	
)	

[REDACTED VERSION]

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO (i)
ELIMINATE AEO DESIGNATIONS & ELIMINATE IMPROPER
PRIVILEGE REDACTIONS; (ii) SEAL DOCUMENTS PENDING
RULING ON AEO STATUS, and (iii) ELIMINATE TEN-DAY
WAITING PERIOD [REDACTED VERSION] (C07-1620MJP)

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1 **I. Introduction**

2 Griffin has not met the heavy burden necessary to establish AEO or confidential treatment
3 for the documents. He has not identified a single document for which AEO or confidential status
4 is warranted. He only claims in generalities that the documents reflect good faith business efforts.
5 Nothing could be further from the truth. Particularly based on over a thousand additional
6 documents Griffin just produced (also nearly blanket AEO/Confidential), it is clear that the plan
7 from the start was to use this litigation to create financial bleeding for the PBC to force them to
8 sell to Griffin's group. This scheme was jointly developed by the City, Griffin, and K&L Gates,
9 which until just a few weeks ago represented both the City and the Griffin group.

10 The AEO designations were an effort to conceal the dealings among these three, and part
11 of a broader effort to, as Griffin wrote in an email, keep his documents ["REDACTED"].¹
12 Moreover, it was just learned that the original AEO designations and redactions were not done
13 by Griffin's current lawyers, but by K&L Gates. It is unclear whether they did this in their role
14 as the City's lawyers or as Griffin's lawyers.

15 **II. The AEO Designations Are Part of a Broader Plan to Thwart Disclosure**

16 The documents just obtained also confirm that the AEO designations are part of a broader
17 effort to conceal the documents. We now know that Griffin intentionally delayed producing
18 them with the hope of concealing them. Here is what he told his partners, Ballmer and Stanton:

19 [REDACTED]
20 [REDACTED]²

21 Incredibly, Griffin testified that he does not know what he meant when he wrote about
22 ["REDACTED"] and keeping the documents ["REDACTED"] even though he wrote this less
23 than four weeks ago.³ He now says his mind is a ["REDACTED"] on these issues.⁴

24
25 ¹ Bracketed material indicates language that is redacted from the public version filed with the Court.

26 ² Ex. 1.

³ Ex. 2, April 29, 2008, Griffin Dep. at 3-5.

⁴ Ex. 3 is a CD showing this testimony, which lasts approximately 90 seconds, and will be hand delivered to the Clerk for filing under seal and to all counsel.

1 **III. Griffin Has Not Met His Heavy Burden**

2 A party seeking court-sanctioned secrecy for documents has a heavy burden, and such
3 treatment is reserved for truly sensitive material where disclosures could cause demonstrable
4 harm or damage. The burden is on the party seeking secrecy to establish the need for AEO
5 and/or confidential status for each document for which such protection is sought. Here, Griffin
6 does not identify a single page for which he seeks AEO or confidential treatment, or offer any
7 specific justifications for any specific document. He offers instead only vague generalizations,
8 claiming the documents deal exclusively with “the good faith business efforts” of a “consortium
9 of local civic-minded businessmen” who offered to contribute money to update KeyArena and
10 “help keep the NBA in Seattle.” As detailed below, these characterizations are not remotely
11 accurate.

12 **IV. The PBC Is Prejudiced by the AEO Designations**

13 The AEO status is prejudicing the PBC. Although the protective order provides that the
14 PBC is entitled to view AEO materials, Griffin claimed the protective order entered by the court
15 was insufficient. He refused to produce any documents unless, pending court review, the PBC
16 agreed that (i) only certain of its lawyers could see AEO material, and (ii) the PBC’s principals
17 could not see it. The PBC accepted this condition because otherwise there would have been
18 significant delay in obtaining the documents.⁵ The PBC has honored this commitment pending
19 the Court’s review. Accordingly, PBC’s counsel cannot advise its client about the contents of
20 these documents. Given what they reveal about the City’s lack of clean hands (see below), it is
21 essential that counsel be permitted to share these documents with the PBC as it prepares for the
22 impending trial. As matters presently stand, PBC’s counsel’s hands are tied. They cannot advise
23 their client and effectively prepare for trial, or even disclose and discuss various details of the
24 defense.

25
26

⁵ We now know, of course, that this was Griffin’s express goal.

1 **V. Griffin Will Not Be Prejudiced By Lifting the Designations**

2 Griffin says that revealing AEO confidential documents to the City might give the City
3 some undefined “unfair advantage” in unidentified future dealings. But the City already knows
4 the information in the documents. How? Because of Griffin’s decision to use the same lawyers
5 as the City. In fact, the City’s lawyers *wrote* many of the documents that Griffin now claims
6 must be designated AEO to prevent the City from gaining an unfair economic advantage.⁶

7 Likewise, there is no potential for future competitive disadvantage vis-a-vis the PBC.
8 Griffin abandoned the effort to purchase the Sonics after both the State and the City were
9 unwilling to contribute funding to renovate KeyArena. As Griffin wrote to his partner, Steve
10 Ballmer, on March 30, 2008:

11 [REDACTED]
12 [REDACTED]

13 And the argument that AEO status is necessary because the PBC still might sell to Griffin
14 is not well founded. The PBC is contractually bound to have the Sonics play in Oklahoma City
15 as soon as permitted under this Court’s ruling. There is a signed lease with Oklahoma City;
16 Oklahoma City voters overwhelmingly passed a tax extension to fund \$120 million in
17 improvements for Ford Center where the team will play; the State of Oklahoma passed
18 legislation to facilitate the move; and the NBA Board of Governors has approved the move
19 pending this Court’s ruling.

20 **VI. Mr. Bennett Made No Deal With Griffin’s Group; He Didn’t Even Know It**
21 **Existed.**

22 Griffin claims that in late March 2008, Mr. Bennett expressed regret that as a result of
23 documents the PBC was providing to the City, the Griffin group’s efforts would be exposed.
24 The email cited as proof of this says no such thing. In fact, Bennett was referring to supposedly
25 private conversations between Bennett and Steve Ballmer. Those conversations actually started
26 back during early 2007 when Ballmer was providing input to Bennett on the legislative efforts to

⁶ Ex. 4.

⁷ Ex. 1.

1 obtain arena financing. Ballmer asked that those conversations be kept “fairly private.” When
2 those private conversations continued more recently, Bennett was unaware that Ballmer was, at
3 the same time, working with Griffin, et al., to hopefully buy the team out from under Bennett.

4 **VII. The PBC Satisfied Its Meet and Confer Obligation**

5 This lawsuit is moving on a fast track. When the documents were produced, the PBC
6 asked Griffin’s lawyers to remove the AEO designations, which were clearly unwarranted. They
7 declined. The PBC scheduled a telephone conference; Griffin’s lawyers did not take the call.
8 Per the terms of the protective order, the PBC filed a motion. The filing of the motion did not
9 deprive Griffin of the ability to subsequently remove the AEO designations. He chose not to,
10 presumably as part of the broader plan to delay production and keep his documents in the dark.
11 The argument that he needed more time to study the issues associated with the documents was
12 simply one more aspect of that plan.

13 **VIII. The Documents Do Not Reflect Good Faith Business Efforts, Much Less Any**
14 **Other Legitimately Confidential Issue or Laudable Conduct**

15 Unless times have changed, the documents cannot fairly be deemed the product of “civic
16 minded businessmen.” They instead reveal a scheme, conceived by the City, Griffin and K&L
17 Gates, to use this litigation and specific performance to bleed the PBC so it would sell to
18 Griffin’s group.

19 The new documents show that Griffin was [REDACTED]
20 “[REDACTED].”⁸

21 Likewise, here is what City lawyer Slade Gorton wrote on December 18, 2007:

22 [REDACTED]
23 [REDACTED]

24

25 [REDACTED]⁹

26 ⁸ Ex. 5 at ¶ 4.d.iii. In his deposition, Mr. Griffin said he does not know what he meant when he used the
phrase “[REDACTED].”

⁹ Ex. 6 (emphases added).

1 The AEO documents also address how the City, K&L Gates, and Griffin sought to obtain
2 \$300 million to renovate KeyArena. They detail lobbying efforts with local and state
3 government officials.¹⁰ This does not warrant either AEO or confidential status. Given that the
4 City was involved, it is hard to understand how efforts to lobby city and state officials can be
5 deemed AEO or "confidential."

6 The PBC's opening brief also explained that Griffin had somehow obtained confidential
7 internal Sonics/NBA financial statements. The new documents show that they were obtained
8 from [REDACTED], a former PBC executive. [REDACTED] was contractually bound not to
9 disclose the documents, which belong to the PBC. Nevertheless, as Griffin explained in an email
10 to Ballmer:

11 [REDACTED] faxed the income statement for the Sonics compared to the
12 league average, high, and low.¹¹

13 [REDACTED], although not a lawyer, has been a key player in the strategy to drive a wedge
14 between the NBA and the Sonics. [REDACTED], who bragged of having a "deep throat" within the
15 NBA,¹² was brought into the fold by Slade Gorton. Based on his claimed connections, [REDACTED]
16 was tasked with creating discord between the NBA and the PBC. Here was his mission:

17 [REDACTED]¹³
18 [REDACTED]

19 Perhaps not surprisingly, K&L Gates recently became concerned that [REDACTED]
20 activities might surface, along with the efforts of Gorton's ex aide, [REDACTED], another
21 "civic minded businessman."¹⁴ Here is what K&L Gates lawyer Gerry Johnson wrote to

22 [REDACTED]:

23 [REDACTED]
24 [REDACTED]

25 ¹⁰ Ex. 7.

26 ¹¹ Ex. 8.

¹² Ex. 9.

¹³ Ex. 10.

¹⁴ [REDACTED] was one of the originators of the "bleed the Oklahoman's" strategy.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED].¹⁵
4 The problem with the "cover" strategy is that as Matt Griffin testified, neither [REDACTED]
5 nor [REDACTED] were acting as advisors to the prospective new ownership group. So, as added
6 "cover," K&L Gates recently claimed that [REDACTED] documents are not discoverable because he
7 is a "non-testifying expert." For his part, [REDACTED] has objected to producing documents in
8 response to a subpoena. Through K&L Gates, he claims work product privilege. He has also,
9 however, delayed his deposition, now claiming he needs independent counsel (he does).

10 The newest documents also reveal an embarrassing web of conflicts. K&L Gates has
11 been representing both the City and Griffin. It represents the City in this litigation and in some
12 of the city's dealings with Griffin. It represents Griffin in attempting to buy the team, and in
13 some of his negotiations with the City. At some times (e.g., lease terms), K&L Gates negotiated
14 with the City on behalf of Griffin. At other times, it switched hats and negotiated with Griffin on
15 behalf of the City (e.g., how much of the \$300 million Griffin would contribute to a remodeled
16 arena). Rounding out the picture, K&L Gates formerly represented the Sonics.¹⁶ With a nod to a
17 bygone era, it appears that K&L Gates represents "the situation."

18 Other types of materials improperly designated AEO include:

- 19 • [REDACTED]¹⁷
20 • [REDACTED]¹⁸
21 • [REDACTED],¹⁹
22 • [REDACTED]²⁰
23

24 ¹⁵ Ex. 11 (emphasis added).

25 ¹⁶ In that capacity, K&L Gates concluded that the Sonics' lease that it now seeks to specifically enforce
26 was "the worst in the league" and that an NBA team "could not be competitive in KeyArena."

¹⁷ Ex. 12.

¹⁸ Ex. 13.

¹⁹ Ex. 14.

²⁰ Ex. 15.

1 Griffin may not want any of this material to surface, preferring to keep it "in the dark."
2 Bluntly, it is presumptuous to expect that documents generated by a partnership between a
3 landlord and a prospective tenant, sharing lawyers, intending to bleed the existing tenant into a
4 sale, are entitled to court-endorsed secrecy.

5 **IX. Conclusion**

6 The AEO and confidential documents are not the type of sensitive commercial
7 information for which court-sanctioned secrecy is warranted. The documents instead chronicle
8 an unseemly alliance among K&L Gates, the City, and Griffin to use this Court's equity powers
9 for an improper purpose. The AEO and confidential designations on the Griffin materials should
10 be lifted.

11 DATED this 2nd day of May, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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